Supreme Court, U.S.
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No. 92-56

In The

Supreme Court of the United States

October Term, 1992

S&M CONSTRUCTORS, INC.,

Petitioner,

v.

THE FOLEY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. When a subcontractor has filed a demand for arbitration under an arbitration clause in its subcontract with a general contractor, and when the general contractor has filed a counterclaim against the subcontractor in that arbitration, may the subcontractor have the entire arbitration stayed by court order because the subcontractor would also like to assert claims against the United States Government in separate proceedings?

LIST OF PARTIES

Respondent the Foley Company has no subsidiary or parent corporations.

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No. 92-56

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S&M CONSTRUCTORS, INC.,

Petitioner,

v.

THE FOLEY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The pertinent opinions below are included in the Petitioner's Appendix and in Respondent's Appendix. The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 959 F.2d 97 (8th Cir. 1992), is reprinted as Appendix A to Petitioner's Appendix. The opinion of the United States District Court for the Western District of Missouri, Western Division, Case No. 92-0412-CV-W-6, which is unreported, is reprinted as Appendix B to Petitioner's Appendix.

A copy of the Order of the Circuit Court of Jackson County, Missouri, dated February 10, 1992, is unreported and is included in Respondent's Appendix, pages 1-2.

Respondent agrees that Petitioner's Petition was filed within ninety (90) days of the judgment of the United States Court of Appeals for the Eighth Circuit, and that a Writ of Certiorari may be granted to review cases in the Courts of Appeals pursuant to 28 U.S.C. §1254(1).

JURISDICTION

STATUTES

There are no constitutional issues involved in this case and no constitutional provisions are pertinent. Respondent does not believe that the Contract Disputes Act of 1978, 41 U.S.C. §601 *et seq.*, governs this case, but acknowledges that petitioner has advanced arguments containing 41 U.S.C. §§602, 605 and 606 of the Contract Disputes Act of 1978. Respondent believes that only 9 U.S.C. §2 applies to this case.

STATEMENT OF THE CASE

Petitioner S&M Constructors, Inc. has submitted an inaccurate, incomplete account of the facts. Respondent the Foley Company incorporates the statement of the facts set forth in the opinion of the United States Court of Appeals for the Eighth Circuit (Petitioner's Appendix, pages A-1 through A-5). In addition, the Foley Company will address S&M Constructors' misstatements of fact and

will provide additional facts which have a bearing on the issues in this case.

The dispute between the parties arose out of S&M Constructors' subcontract with general contractor the Foley Company for construction services at a federal project known as Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland (herein "the Project").

Disputes arose between S&M Constructors and the Foley Company on the Project and while construction was still underway, S&M Constructors filed a Demand for Arbitration with the American Arbitration Association on October 24, 1990. (Respondent's Appendix, pages 3-5). Foley filed an Application to Stay Arbitration on December 6, 1990. S&M Constructors filed an Answer to Foley's Application to Stay Arbitration, on February 18, 1991. S&M argued that arbitration should be compelled. (Respondent's Appendix, pages 6-11). On September 27, 1991, Foley dismissed its Application to Stay Arbitration upon the agreement of the parties. (Respondent's Appendix, pages 12-14).

On November 1, 1991, counsel for S&M Constructors and Foley attended a preliminary hearing with the arbitrators and a schedule for the arbitration was set, with the arbitration hearing to commence on February 3, 1992. Pursuant to the schedule set on November 1, Foley Company filed an Amended Answer and Counterclaim on December 16, 1991, alleging damages of more than $2.3 million against S&M Constructors. (Respondent's Appendix, pages 15-19). Both S&M Constructors and Foley Company filed Statements of Facts in the arbitration for

the benefit of the arbitrators on January 16, 1991. (Respondent's Appendix, pages 20-29).

On January 23, 1992, S&M Constructors filed a Petition for a Temporary Restraining Order and a Preliminary Injunction in the Circuit Court of Jackson County, Missouri, to stop the arbitration from commencing. (Respondent's Appendix, pages 30-36). The Circuit Court of Jackson County, Missouri initially issued a temporary restraining order until the matter could be heard, but then dissolved the temporary restraining order and denied S&M Constructors' motion for preliminary injunction on February 10, 1992. (Respondent's Appendix, pages 1-2).

On February 14, 1992, S&M Constructors filed a Motion for Temporary Restraining Order in the United States District Court, Western District of Missouri, to stop the arbitration. (Respondent's Appendix, pages 37-44). The United States District Court issued its decision on February 21, 1992, denying S&M Constructors' Motion. (Petitioner's Appendix, pages A6-A9).

On February 24, 1992, S&M Constructors filed several pleadings in the United States Court of Appeals for the Eighth Circuit, including a Motion for Stay Pending Appeal, and a Motion for Temporary Stay of Arbitration. (Respondent's Appendix, pages 45-48). The United States Court of Appeals for the Eighth Circuit issued its decision denying S&M's Motions on March 16, 1992. (Petitioner's Appendix, pages A1-A5).

S&M Constructors filed a Motion in the United States Court of Appeals for the Eighth Circuit on March 18,

1992, to stay enforcement of the Court of Appeals' decision pending an application to this Court for a Petition for Writ of Certiorari. The United States Court of Appeals issued its decision denying S&M Constructors' Motion on March 27, 1992.

The American Arbitration Association rescheduled the arbitration for March 31, 1992. On March 30, 1992, one day before the arbitration was scheduled to commence, S&M Constructors filed a Chapter 11 bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Ohio, Case No. B92-11872. S&M Constructors' bankruptcy is still pending.

S&M Constructors' demand for arbitration sought damages against the Foley Company in the amount of $1,112,648.63. (Respondent's Appendix, pages 3-5). S&M Constructors filed a pleading explaining to the arbitrators that this amount consists of claims against the Foley Company for non-payment of invoices in the amount of $297,215.25, and other claims in the amount of $815,432.88 for delays in obtaining security clearances, claims for additional work and claims for changed conditions. (Respondent's Appendix, pages 25-29).

S&M Constructors' contentions at pages 2 and 3 of its Petition are incorrect and misleading. S&M Constructors' Demand for Arbitration, filed on October 24, 1990, sought compensation from the Foley Company for delay claims and other claims which S&M Constructors now contends are claims to be made against the Government under the Contract Disputes Act. (Respondent's Appendix, pages 3-5, 25-26). The Foley Company has claims against S&M

Constructors because S&M's work was deficient, defective, delayed far past the schedule required by the Government, and not in conformance with the Government's contract documents. (Respondent's Appendix, pages 15-24). Thus, it is inaccurate for S&M to state that S&M "properly requested periodic payments under the S&M-Foley subcontract, several of which payments were refused by Respondent." S&M Constructors sought not only those payments, but also delay damages and other claims in its Demand for Arbitration, and the Foley Company had legitimate claims against S&M Constructors at the time of the presentation of the periodic pay requests which far exceeded the amounts of those requests.

The first two sentences in the first full paragraph of page 3 of S&M's Petition are inaccurate as S&M Constructors' Demand for Arbitration initially included delay damages and other claims which S&M Constructors asserts against the Government as well. (Respondent's Appendix, pages 3-5, 25-26).

S&M's statement on page 3 that "Petitioner was in agreement with Respondent that the arbitration should be delayed since the Government, as cause of the delay, was inextricably linked to this cause of action" is false as S&M Constructors filed an Answer to Foley's initial Application to Stay Arbitration in which S&M Constructors disagreed with that contention and argued that the arbitration should proceed and that the Government was not a necessary party. (Respondent's Appendix, pages 6-11). S&M's final paragraph on page 4 is also false for the same reason. S&M omits the fact that the Foley Company dismissed the Application to Stay Arbitration on

September 27, 1991. (Respondent's Appendix, pages 12-14).

The entire first paragraph on page 5 of S&M Constructors' Petition is false and misleading. It is true that S&M Constructors submitted claims to the Government for security clearance delays and for other Government acts and omissions. However, S&M Constructors has alleged the same security clearance delay claims and other claims against Foley Company in the arbitration, beginning with its Demand for Arbitration and continuing through its submission of a Pre-hearing Statement on January 16, 1991, (Respondent's Appendix, pages 3-5, 25-29). The Foley Company does *not* have additional claims filed against the Government which aggregate in excess of $2,000,000 as contended by S&M Constructors. Instead, the Foley Company has asserted these claims against S&M Constructors, as explained in its Amended Answer and Counterclaim and Statement of Facts in the arbitration. (Respondent's Appendix, pages 15-24). At the time of the filing of this Brief in Opposition, the Foley Company has not submitted any claims to the Government (although Foley may submit claims to the government in the future in order to avoid the over three hundred days of liquidated damages which the Government has asserted against the Foley Company for the delays caused by S&M Constructors).

S&M Constructors' statement in the second paragraph on page 5 of its Petition that "Petitioner's demands against respondent in the arbitration proceeding are precisely the same claims for equitable adjustment that Petitioner has submitted to the Contracting Officer against the United States Government" is not true as some of the

claims submitted by S&M Constructors, as described in S&M's Preliminary Statement, have not been submitted to the Government and are brought against Foley only, such as the claims for non-payment of invoices. (Respondent's Appendix, pages 25-29).

S&M Constructors mentions Foley's initial Application to Stay Arbitration, which was dismissed by agreement of the parties on September 27, 1991. (Respondent's Appendix, pages 12-14). However, S&M omits the fact that it has reversed its position 180 degrees from the Answer which it filed to Foley's initial Application to Stay Arbitration. (Respondent's Appendix, pages 6-11). In that Answer, S&M Constructors argued that Foley should be compelled to arbitrate despite the fact that some of the claims may be presented against the Government under the Contract Disputes Act. (Respondent's Appendix, pages 6-11).

S&M Constructors falsely states at pages 5 and 6 of its Petition that "Respondent's Counterclaim is based primarily on the premise that Petitioner is the cause of the obstruction of Respondent's scheduling and, therefore, prevented Respondent's completion of the Project in a timely manner" and that these delay claims are really the fault of the Government. Many of the Foley Company's claims against S&M Constructors do not relate to delays for which the Government had any responsibility. Instead, many of Foley's claims against S&M relate to S&M's defective and deficient work, such as tunneling a hole in a mountain at the wrong elevation, overexcavating many areas, failing to control wet zones during shotcrete work, performing improper scaling of rock, causing noxious smoke and fumes to fill the tunnels, and failing

to pay subcontractors and suppliers even after Foley had paid S&M to pay the subcontractors and suppliers. (Respondent's Appendix, pages 15-24). These claims are not delay claims and do not involve the Government.

S&M Constructors' statement in the first sentence of the first full paragraph on page 6 omits the fact that approximately one year after S&M sought to *compel arbitration* (Respondent's Appendix, page 6-11), S&M filed pleadings and appeals in every imaginable forum to *stay the arbitration which S&M initiated.* After every appeal failed, and one day before the arbitration was to commence, S&M filed for bankruptcy and the automatic stay provisions of 11 U.S.C. §362 stayed the arbitration.

SUMMARY OF ARGUMENT

S&M Constructors' Petition for Writ of Certiorari should be denied because the decision of the United States Court of Appeals for the Eighth Circuit correctly states the applicable decisions of this Court. The Court of Appeals' decision does not conflict with the decision of any other United States Court of Appeals, does not conflict with any Missouri state court decisions, and does not depart from the accepted and usual course of judicial proceedings.

The United States Court of Appeals for the Eighth Circuit correctly stated that this Court has decided that arbitration brought pursuant to a contract clause must go forward even if one of the parties claims that bifurcated proceedings will result. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v.*

Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

S&M Constructors has failed to meet its burden to show congressional intent to preclude a waiver of judicial remedies for claims brought under the Contract Disputes Act. *Shearson/American Express*, at 226-227; *Mitsubishi Motors Corp.*, at 628.

There is no legal authority in support of S&M's contention that when a subcontractor has made a demand for arbitration under an arbitration clause in a contract with the general contractor, and the general contractor files counterclaims against the subcontractor in that arbitration, the subcontractor may have the entire arbitration stayed because the subcontractor would like to bring claims against another party in another dispute resolution forum. There is no merit in S&M's position.

ARGUMENT

The United States Court of Appeals for the Eighth Circuit correctly decided this case, applying several decisions of this Court which hold that a demand for arbitration under a contractual arbitration clause will be upheld and the arbitration will be compelled to proceed even if one party believes that the arbitration would result in piecemeal litigation in other forums. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213

(1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). S&M's arguments are contrary to these decisions and S&M presents no contrary authority of any consequence. S&M Constructors' arguments are without merit and this Court should deny S&M's Petition.

S&M Constructors filed the initial Demand for Arbitration under its subcontract with the Foley Company. S&M Constructors has not alleged that its subcontract with the Foley Company should be revoked or that any grounds exist for the revocation of the contract. Pursuant to 9 U.S.C. §2, the arbitration clause in the subcontract between S&M and Foley is "valid, irrevocable, and enforceable." (Petitioner's Appendix, page 13).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that an antitrust dispute was subject to arbitration under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, even if some of the claims involved causes of action conferred by federal statutes. This Court stated: "(b)y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*, at 628. This Court also found that:

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. *Id.*, at 628.

This Court restated this principle in *Shearson/American Express* and found that the burden is on the party opposing arbitration to come forward with evidence of Congressional intent to preclude a waiver of judicial remedies for the statutory rights at issue. *Id.*, at 226-227.

S&M Constructors has failed to meet its burden as it has shown no congressional intent to preclude a waiver of judicial remedies for claims brought under the contract Disputes Act of 1978, 41 U.S.C. §601 *et seq.* S&M Constructors states that despite its initial Demand for Arbitration against the Foley Company, in which it sought all of its present claims against the Foley Company, it now wants to bring some of its claims in a separate proceeding under the Contract Disputes Act. S&M has stated no legal authority and shown no congressional intent in support of its contention that claims under the Contract Disputes Act of 1978 should be considered non-arbitrable as a matter of law, if such claims also fall within the arbitration clause of a contract.

Apart from these legal precedents, S&M Constructors' arguments are based upon a false and misleading factual contention that all of the claims between S&M Constructors and the Foley Company are also claims which could be brought against the United States Government. The pleadings filed in the arbitration by both S&M Constructors and the Foley Company disprove this contention and show instead that both parties have brought claims in the arbitration which are asserted only against each other, and which could not possibly be brought against the United States Government. (Respondent's Appendix, pages 3-5, 15-29). The Foley Company has claims against S&M Constructors for S&M's defective

and non-conforming work such as tunneling into a mountain at the wrong elevation, failure to control wet zones during shotcrete work, improper scaling of rock during tunneling work, allowing noxious smoke and fumes to enter tunnels, and failure to pay subcontractors and suppliers even though the Foley Company had paid S&M Constructors to pay those subcontractors and suppliers. These claims are brought by the Foley Company against S&M Constructors, not the United States Government.

Similarly, S&M Constructors has claims which can be brought only against the Foley Company, such as S&M's allegations that the Foley Company has wrongfully withheld payments for invoices from S&M Constructors. Thus, this case does not involve claims which were brought in arbitration but which could also be brought against the United States Government. This case could not be simply transferred as a whole out of the arbitration proceeding and into a proceeding against the United States Government under the Contract Disputes Act.

S&M Constructors complains at page 8 of its Petition that the United States Government could not be a party to the proposed arbitration proceeding. However, this is a common situation in construction arbitration proceedings, as often one of the parties wishes that a surety, architect, engineer or owner's representative, who is not a party to the arbitration agreement, could be brought into the arbitration to share in the responsibility. This Court and the United States Court of Appeals for the Eighth Circuit have held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT&T Technologies, Inc. v. Communication Workers of*

America, 475 U.S. 643, 648 (1986); *United States of America for the use and benefit of Capital Electric Construction Co., Inc. v. Pool & Canfield, Inc.*, 778 F.Supp. 1088, 1090 (W.D. Mo. 1991). The Court in *Capital Electric, supra*, held that a subcontractor seeking to arbitrate with a general contractor under an arbitration clause in its subcontract could not force a surety company, not a party to that contract, to arbitrate. The fact that the United States Government is not a party to the S&M-Foley contract is of no consequence to the enforceability of the contract's arbitration clause. S&M Constructors could have excluded claims against the United States Government from the contractual arbitration clause, but did not. *Mitsubishi Motors*, at 628.

S&M Constructors states on page 9 of its Petition that the United States Court of Appeals for the Eighth Circuit erred in not considering the "unique context of government contracting". S&M's contention is contrary to this Court's holding in *Mitsubishi Motors Corp., supra* that "(h)aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628. S&M Constructors has failed to show any congressional intent to preclude a waiver of judicial remedies in the context of government contracting. The "factual distinction" urged by S&M Constructors in the first paragraph on page 9 of its Petition is not supported by any legal authority and represents only an invention of S&M Constructors. S&M's arguments in the first full paragraph at page 10 of its Petition fail for the same reason.

S&M Constructors relies on *Grinnell Fire Protection Systems Co., Inc. v. Regents of University of California,* 554 F.Supp. 495 (N.D. Cal. 1982), but that case is inapplicable. As noted by the United States Court of Appeals for the Eighth Circuit, *Grinnell* does not involve the Contract Disputes Act, involves the staying of diversity litigation, and was decided before this Court's decisions in *Mitsubishi Motors Corp., supra; Shearson/American Express, supra; Moses H. Cone Memorial Hospital, supra;* and *Dean Witter Reynolds, supra.*

S&M Constructors relies on *Wilko v. Swan,* 346 U.S. 427 (1953), but this Court has held that an argument based upon *Wilko v. Swan* is no longer persuasive under these circumstances. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 231-232 (1987).

S&M Constructors' rhetoric about the "grave need" for this Court to examine this issue ignores S&M's failure to come forward and meet its burden to show that Congress has shown an intent to preclude a waiver of judicial remedies for claims brought under the Contract Disputes Act. *Mitsubishi Motors Corp.,* at 628; *Shearson/American Express, Inc.,* at 226-227. S&M Constructors cites no applicable legal authority and presents no Congressional intent in support of its arguments. The decision of the Eighth Circuit Court of Appeals is correct and S&M Constructors' arguments are without merit.

CONCLUSION

For these reasons, petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

S&M CONSTRUCTORS, INC.,	)	
Plaintiff,	)	Case No.
	)	CV92-1585
vs.	)	Civil F
THE FOLEY COMPANY,	)	
	)	
Defendant.	)	

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER AND DENYING PRELIMINARY INJUNCTION

This matter comes on for hearing before the Court this 10th day of February, 1992. Plaintiff appears by counsel Robert Andrews and Ronald Kraft and defendant Foley Company appears by counsel Kevin Glynn and by representative Ken Kure.

After hearing argument and reviewing the briefs of the parties on the legal issues involved the Court finds that:

1. A valid arbitration agreement exists between the parties as a provision of the written contract between the parties.

2. The law obtaining in this state favors the enforcement of arbitration agreements.

3. The Court determines that the disputes between the parties are encompassed in the arbitration agreement.

4. The Court finds that the agreement to arbitrate was freely entered into between the parties.

5. The Court finds that pursuant to Section 435.355 of the Missouri Revised Statutes and having found existence of a valid arbitration agreement the Court is required to dissolve the temporary restraining order heretofore entered.

NOW THEREFORE IT IS ORDERED that the temporary restraining order heretofore entered is dissolved and the Petition for Temporary Injunction is denied. The costs of this action are assessed against the plaintiff.

/s/ Preston Dean
Judge

Date: February 10, 1992
Time: 9:30 A.M.

Copies to:

Kevin E. Glynn
Ronald Kraft
Robert Andrews

MEDIATION Please consult the Construction Industry Mediation Rules regarding mediation procedures. If you want the AAA to contact the other party and attempt to arrange a mediation, please check this box. ☐

CONSTRUCTION INDUSTRY ARBITRATION RULES
DEMAND FOR ARBITRATION

DATE: October 24, 1990

To: Name Foley Company
(of party upon whom the demand is made)
Address 7501 Front Street
City and State Kansas City, Missouri
ZIP Code 64120
Telephone (816) 241-3335 Fax (816) 241-4321
Name of Attorney _____
(if known)
Attorney's Address _____
City and State _____ ZIP Code _____
Telephone ( ) _____ Fax _____

The named claimant, a party to an arbitration agreement contained in a written contract, dated February 27, 1989, providing for arbitration under the Construction Industry Arbitration Rules, hereby demands arbitration thereunder.

(Attach the arbitration clause or quote it hereunder.)

SEE ATTACHMENT "A"

NATURE OF DISPUTE:

Moneys owing under contract, for additional work performed, and for delay damages.

CLAIM OR RELIEF SOUGHT: (amount, if any)
Monetary relief: $1,112,648.63

Please indicate the industry category of each party.

CLAIMANT: ___ Owner ___ Architect
___ Landscape Architect
___ Engineer___ Contractor
_x_ Subcontractor (specify tunnelling)
___ Interior Designer ___ Other _____

RESPONDENT: ___ Owner ___ Architect
___ Landscape Architect
___ Engineer _x_ Contractor
___ Subcontractor (specify ____)
___ Interior Designer ___ Other _____

HEARING LOCALE REQUESTED: Washington, D.C.
(City and State)

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Washington, D.C. Regional office, with the request that it commence the administration of the arbitration. Under the rules, you may file an answering statement after notice from the administrator.

Signed /s/ Robert J. Andrews Jr.
(May be signed by attorney)
Robert J. Andrews, Jr.
Title Attorney for Claimant
Name of Claimant S&M Constructors, Inc.
Address (to be used in connection with this case) 29100 Hall Street

City and State Solon, Ohio ZIP Code 44139
Telephone (216) 248-0376 Fax (216) 248-8248
Name of Attorney Andrews & Ryan
Attorney's Address 29100 Hall Street
City and State Solon, Ohio ZIP Code 44139
Telephone (216) 248-2009 Fax (216) 248-8248

To institute proceedings, please send three copies of this demand with the administrative fee, as provided for the rules, to the AAA. Send the original demand to the respondent.

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE FOLEY COMPANY Plaintiff, -vs- S&M CONSTRUCTORS, INC. Defendant.	)	CASE NO. CV90-032241

DEFENDANT'S ANSWER TO PLAINTIFF'S
APPLICATION TO STAY ARBITRATION

Now comes S&M Constructors, Inc. ("S&M") in response to Plaintiff's Application, pursuant to R.S.Mo. Section 435.355 and prays that this Court deny Plaintiff's Application to Stay Arbitration and prays for an order to compel arbitration. In support of this Answer, S&M states:

1. S&M is an Ohio corporation in good standing with its offices at 29100 Hall Street, Solon, Ohio 44139.

2. Upon information and belief, The Foley Co. ("Foley"), is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri 64120.

3. S&M is a subcontractor of Foley for a United States Army Corps of Engineers project known as the Power Reliability Enhancement Program, Fort Ritchie, Maryland. The subcontract between S&M and Foley contains an Arbitration and Enforcement Cost Clause requiring that "disputes arising under this Agreement, or any

instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association." The arbitration clause requires any hearings to be held in Kansas City, Missouri. A copy of the subcontract and the arbitration clause are annexed hereto as Exhibit "A".

4. As a result of numerous irreconcilable disputes between S&M and Foley, S&M filed a demand for arbitration that is currently before the American Arbitration Association, Kansas City, Missouri.

5. The American Arbitration Association, by letter dated November 26, 1990, requested the parties to choose arbitrators and requested Foley to file its Answer and any counterclaim by December 6, 1990. A copy of the letter of the American Arbitration Association is annexed hereto as Exhibit "B".

6. Foley responded to the American Arbitration Association by letter dated December 5, 1990 that transmitted Foley's Answer and Counterclaim in the arbitration styled S&M Constructors, Inc. and the Foley Company, Case No. 57 110 0079 90 as well as a copy of its Application to Stay Arbitration filed with this Court. A copy of the transmittal letter and Answer and Counterclaim of Foley are annexed hereto as Exhibit "C".

7. In its Application to Stay Arbitration, Foley states that the subcontract with S&M provides, in Attachment 5, Schedule D, paragraph 1, that "all the various contract documents between the Owner and the Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis*

mutandis, The Foley Company Co. and Subcontractor." See Exhibit "A", Attachment 5.

8. Foley maintains that the incorporation by reference language of Attachment 5, Schedule D, Paragraph 1 incorporates into the subcontract the "disputes" clause contained in the prime contract between the United States Army Corps of Engineers and Foley, which disputes clause is binding upon S&M as subcontractor.

9. Similarly, Foley maintains that S&M is bound by the provisions of the prime contract governing "Changes," which dictates a procedure for the assertion of cost increases or changes in time of performance.

10. It is Foley's contention that the Disputes and Changes clauses of its contract with the United States Army Corps of Engineers, by virtue of their incorporation by reference, are the sole dispute resolution provisions available to S&M.

11. Foley's interpretation of the incorporation by reference of the terms of the prime contract is at odds with the plain language of the subcontract between Foley and S&M, which states that "disputes arising under *this Agreement*, or under any instrument made to carry out the terms of this Agreement, *shall* . . . be submitted to *arbitration*. . . . " [Emphasis Supplied] Through its incorporation by reference, the prime contract is part of the subcontract and as is clear from the foregoing, disputes arising under this Agreement, including any disputes with respect to the interpretation and application of the disputes and changes clauses, are subject to arbitration.

12. Foley, as the drafter of the contract, made no reservation or limitation under the arbitration clause with respect to the disputes or changes clauses of its prime contract. Therefore, it must be bound by the terms of its agreement with S&M to subject all disputes to arbitration. At the least, the conflict between the provisions of the prime and subcontract constitute an ambiguity that must be construed against Foley as drafter. *Slotkin v. Wilmering*, 464 F.2d 418 (1972); *Eastmont Construction Co. v. Transport Mfg. & Equipment Co.*, 301 F.2d 34 (1962).

13. The American Arbitration Association requested comments by S&M's counsel to Foley's Application to Stay Arbitration, which comments set forth the foregoing arguments. A copy of the request for comments and response of S&M's counsel are annexed hereto as Exhibit "D".

14. By letter dated January 11, 1991, the American Arbitration Association stated in pertinent part:

> The American Arbitration Association, after reviewing the contentions of the parties and the arbitration agreement, has determined that an issue as to arbitrability exists which may be determined by an arbitrator.

A copy is annexed hereto as Exhibit "E".

15. The agreement to arbitrate contained in the S&M subcontract with Foley is controlling when viewed on the basis of both the plain meaning of the contract and in the context of Foley as the party drafting the subcontract that contained the arbitration clause. This position is consistent with the view expressed by the Third Circuit Court of Appeals in *Sharon Steel Corp. v. Jewell*

Coal & Coke Co., 735 F.2d 775, 778-779 (3rd Cir. 1984). The Court held that "so long as the appellate's claim of arbitrability was plausible, interpretation of the contract should have been passed on to the arbitrator." *See, e.g., Pearl St. Development Corp. v. Conduit & Foundation Corp.*, 41 N.Y.2d 167, 391 N.Y.S.2d 98 (1976); *East Bernadino Cty. Water Dist. v. City of San Bernadino*, 109 Cal. Rptr. 510 (1973).

16. S&M requests that this Court find an agreement to arbitrate between the parties and thereby allow this matter to be resolved by arbitration before the American Arbitration Association.

WHEREFORE, Defendant S&M Constructors, Inc. prays that this Honorable Court deny Plaintiff's Application to Stay Arbitration and enter its Order requiring Plaintiff, The Foley Company, to arbitrate.

KRAFT, BROWER, GORDON and ZELDIN

By: /s/ Ronald L. Kraft
Ronald L. Kraft – MO #21382
Attorney for Defendant
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P.O. Box 33156
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Fax (816) 361-9865

OF COUNSEL

Robert J. Andrews, Jr.
Andrews & Ryan
29100 Hall St.
Solon, Ohio 44139
(216) 248-2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Answer to Plaintiff's Application to Stay Arbitration was served by courier service this 18th day of February, 1991, on:

Mr. Kevin E. Glynn
and Mr. William J. DeBauche
NIEWALD, WALDECK & BROWN
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105

/s/ Ronald L. Kraft
Ronald L. Kraft
Attorney for Defendant

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE FOLEY COMPANY, Plaintiff, vs. S&M CONSTRUCTORS, INC., Defendant.	)))))))	Case No. CV90-32241 Civil B (Filed Sep. 27 1991)

PLAINTIFF'S STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW plaintiff, the Foley Company, by and through its counsel; and dismisses its Application to Stay Arbitration without prejudice.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, MO 64105
Telephone (816) 471-7000
Telecopier (816) 474-0872

/s/ William J. DeBauche
Kevin E. Glynn #21935
William J. DeBauche #32674

ATTORNEYS FOR PLAINTIFF
THE FOLEY COMPANY

I hereby certify that a
true and correct copy of
the above and foregoing was
served by telecopier this
27 day of
SEPTEMBER, 1991 to:

Ronald Kraft
Kraft, Brower, Gordon
and Zeldin
9237 Ward Parkway, Suite 200
Kansas City, Missouri 64114

Robert Andrews
Andrews and Ryan
21900 Hall Street
Solon, OH 44139
Attorneys for Defendant
S&M Constructors, Inc.

/s/ William J. DeBauche
Attorneys for Plaintiff
The Foley Company

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE FOLEY COMPANY, Plaintiff, vs. S&M CONSTRUCTORS, INC., Defendant.	)	Case No. CV90-32241 Civil B

ORDER

The Court has reviewed plaintiff's Stipulation of Dismissal Without Prejudice. The Court hereby dismisses plaintiff's Application to Stay Arbitration without prejudice, with each party to bear its own costs.

/s/ Gene R. Martin
Judge

Date: September 27, 1991

Copies to:

Kevin E. Glynn
Ronald Kraft
Robert Andrews

AMERICAN ARBITRATION ASSOCIATION

S & M CONSTRUCTORS, INC.

and

THE FOLEY COMPANY

Case No.
57 110 0079 90

THE FOLEY COMPANY'S ANSWER AND AMENDED COUNTERCLAIM

COMES NOW the Foley Company and for its Answer and Amended Counterclaim, states:

1. Foley denies all of the allegations of S & M's Demand for Arbitration.

2. Foley is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri 64120.

3. S & M is an Ohio corporation with its offices at 29100 Hall Street, Solon, Ohio 44139.

4. S & M entered into a subcontract with Foley on a project for the United States Corps of Engineers known as Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland (herein "the project").

5. In the course of S & M's performance of its subcontract with Foley on the Project, S & M failed to perform its subcontract properly as (a) S & M was delinquent in its performance on the submittals which were required before initiation of work activity, (b) S & M started its performance on the Project behind the schedule which they had provided, (c) S & M failed to perform its work in a timely fashion in accordance with the requirements of

the contract and in accordance with the approved schedule; (d) S & M failed to pay its subcontractors and suppliers, including amounts which Foley paid to S & M for payment by S & M to those subcontractors and suppliers, and (e) S & M's work has been defective and deficient and not in conformance with the contract requirements, among other failures of performance by S & M.

6. As a result of S & M's delays, its defective, deficient and non-conforming work, and its failures to pay its subcontractors and suppliers, among other failures of performance by S & M, S & M has breached its subcontract with Foley, has been negligent in the performance of its subcontract, and in addition, S & M has failed to comply with the indemnity clause in its subcontract with Foley.

7. As a result of all of these failures by S & M, Foley has sustained damages as set forth on Exhibit A, which is attached. These damages are based on a projected completion date of January 25, 1992, and may be adjusted if the project is completed on a different date.

WHEREFORE the Foley Company denies all of the allegations of S & M Constructors, Inc.'s Demand for Arbitration and prays that S & M Constructors, Inc. may recover nothing on its Demand for Arbitration, and the Foley Company prays for an award of damages on its Counterclaim against S & M Contractors, Inc. in an amount of $2,359,849.12, based on a projected completion

date of January 25, 1992, and for all costs, and for any other relief which this panel may deem appropriate.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 471-7000

/s/ William J. DeBauche
Kevin E. Glynn #21935
William J. DeBauche #32674

ATTORNEYS FOR THE
FOLEY COMPANY

I hereby certify that a true and correct copy of the above and foregoing was mailed this 16 day of DECEMBER, 1991 to:

Robert J. Andrews, Jr.
Andrews and Ryan
21900 Hall Street
Solon, Ohio 44139
Attorneys for S & M Constructors

/s/ William J. DeBauche
Attorneys for the Foley Company

EXHIBIT A

SUMMARY OF DAMAGES

Subcontractors Cost	
Pioneer Electric, Inc.	116,280.08
ACandS	1,817.00
W. C. Wiedenmann & Sons	29,826.00
D. L. George & Sons	64,132.26
Foley Company	
Smoke-outs	5,832.54
Overexcavation Keyway Barrier "C", Substation Invert, Reservoir Bottom, "B" Invert, "C" Invert, "F" Invert	53,722.02
Scaling Areas "C" & "D"	12,228.79
Scaling Areas "B", "E" & "F"	15,529.19
Remove Fan Line Area "C"	605.27
Correct Wet Zones Area "G"	1,585.89
Overtime-Acceleration	25,479.73
Overexecavation in Area "G"	82,081.05
Overexcavation – At Cooling Towers	29,397.58
Assist S & M Coring Shotcrete	475.44
Install Chainlink Area "D"	2,586.38
Tight Removal Barrier "B", Intersection "F" & "G", Sump Area "G"	3,720.00
Assist S&M Remove Tights & Grout Voids	18,597.24
Engineering Error in "F"	30,620.98
Test Rock Bolts & Replace Deficient Bolts	3,389.59
Cleanup & Dispose of Contaminated Oil & Soil	1,210.00
Scheduling	4,000.00
Consulting Fees	20,000.00
Attorney Fees	46,578.08
Extended Field Overhead	426,579.27
Extended Home Office Overhead	222,272.00

Liquidated Damages	350,300.00
Performance Cost Increase	576,471.00
Subtotal	2,145,317.38
Profit	214,531.74
Total	$2,359,849.12

AMERICAN ARBITRATION ASSOCIATION

S & M CONSTRUCTORS, INC.

AND Case No. 57 110 0079 90

THE FOLEY COMPANY

THE FOLEY COMPANY'S STATEMENT OF FACTS

The Foley Company's Amended Counterclaim against S & M Constructors arises from S & M's delays and deficient and nonconforming work performed on its subcontract with Foley, the general contractor, on a project known as the Alternate Joint Communications Center, a military installation in Pennsylvania. The contract was administered by the U.S. Army Corps of Engineers from its Fort Ritchie, Maryland office.

The project site contains national alternative communication centers in hardened facilities for the Department of Defense, built into a mountain about seventy-five miles from Washington, D.C. The project at issue in this arbitration involved enlarging and modernizing the center and enhancing the reliability of the mechanical systems. Foley's contract involved increasing the size of the facility by constructing additional tunnels and work rooms. Much of the work took place in new areas of the mountain not previously excavated or blasted. S & M entered into a subcontract with Foley to perform blasting, excavation and tunneling work. Foley Company performed the general and mechanical construction following S & M's work.

A summary of Foley's claims against S & M are contained on Exhibit A to Foley's Amended Counterclaim. Foley's damages caused by S & M total $2,359,849.12, assuming a completion date of January 25, 1992.

S & M's performance of its subcontract was deficient from the beginning, as S & M was delinquent in transmitting submittals which were requisite prior to the initiation of work activity. S & M commenced its performance behind the schedule which it had provided. S & M's performance was deficient in many other instances as the work progressed, so that Foley sustained 310 days of delay to its work on the project as a result of S & M's delinquent and deficient performance. The Corps of Engineers has assessed liquidated damages against Foley at a cost of $1,150.00 per day, for a total of approximately $350,000.00 in liquidated damages assessed against Foley as a result of S & M's delinquent and deficient performance.

S & M's performance of its tunneling work was defective, deficient and not in conformance with the contract documents. S & M overexcavated many areas on the project, including the tunnel inverts in Areas B, C and F; the cooling tower and heat exchanger foundations located in Area B; the keyway at the blast barrier in Area C; the electrical substation invert, the reservoir bottom; and the Mechanical Room in Area G. In addition, S & M was responsible for an error in the elevation of Tunnel F. The contract documents contained specific limits for excavation, which S & M consistently breached.

As a result of S & M's excavation errors in many areas, Foley Company in its subsequent performance of the general and mechanical construction work was forced to incur additional costs and delays because of Foley's need to perform additional work to make up for S & M's excavation errors.

The Corps of Engineers would not accept S & M's shotcrete work in Area G, as S & M did not properly control the wet zones in that area during construction. The Corps would not accept the work until the wet zones were properly abated. S & M refused to perform this work, which was required by its subcontract, and Foley was forced to perform it for S & M.

The Corps of Engineers also found S & M's work in several areas unacceptable with regard to the scaling of rock from the invert to the apex. The Corps would not permit any following work to be performed in these areas for safety reasons. S & M refused to perform this scaling work in a manner acceptable to the Corps. Foley performed S & M's scaling work for S & M to keep the job from being further delayed.

S & M also caused Foley to incur costs and time delays due to smoke outs caused by S & M's failure to comply with the contract requirements for temporary utilities. Noxious smoke and fumes emanated from existing tunnels and vent shafts, and the Corps found that this problem was caused by S & M's failure to perform its work in accordance with the contract.

Foley has also learned that S & M failed to pay some of its suppliers and subcontractors, even though Foley

had paid S & M for the pay estimates for the time frame when those costs were incurred.

The contract between Foley and S & M allows Foley to charge its consulting fees and attorney's fees for this proceeding to S & M, and these amounts are included in Exhibit A.

Foley has also charged extended overhead in accordance with the formulas approved by the Courts. Foley has charged S & M for the liquidated damages which the Corps has charged Foley and which are attributable to S & M's delays. The excessive period of delay caused to Foley by S & M's breaches and failures caused Foley to incur performance cost increases in several areas and these costs are included on Foley's Exhibit A as well.

Exhibit A contains other items which Foley will explain in full at the arbitration. In this Statement, Foley has presented the arbitrators with many of the most significant delays and costs caused by S & M.

Foley believes that it owes nothing on S & M's claim, as S & M is seeking relief for areas of work in which S & M performed deficient and non-conforming work and in which S & M delayed Foley's work. Further, Foley has expended significantly more money to perform and correct S & M's work than S & M contends remains as unpaid contract balances. The amount withheld by Foley

is a great deal less than the costs caused to Foley by S & M's delays and deficient and non-conforming work.

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/s/ William J. DeBauche
Kevin E. Glynn #21935
William J. DeBauche #32674

ATTORNEYS FOR THE
FOLEY COMPANY

I hereby certify that a true and correct copy of the above and foregoing was mailed this 16 day of January, 1991 to:

Robert J. Andrews, Jr.
Andrews and Ryan
4403 St. Clair Avenue
Cleveland, Ohio 44103-1125
Attorneys for S & M Constructors
/s/ William J. DeBauche
Attorneys for The Foley Company

AMERICAN ARBITRATION ASSOCIATION

S&M CONSTRUCTORS, INC.

and Case No. 57 110 0079 90

FOLEY COMPANY

PRE-HEARING STATEMENT OF S&M CONSTRUCTORS, INC.

S&M Constructors, Inc. ("S&M") and Foley Company ("Foley") entered into a subcontract dated February 27, 1989 in the amount of $5,200,000.00 for the performance of certain excavation and shotcreting work at the Power Reliability Enhancement Program (AJCC) ("Project") Fort Ritchie, Maryland. Foley was the prime contractor for the Project under Contract No. DACA31-89-C-0008 which contract was incorporated by reference into the S&M subcontract.

From the outset of the Project, S&M experienced numerous delays in the commencement and conduct of its work, and performed work in excess of contract requirements. These delays and extra work have been due solely to the failure of the Government and/or Foley to perform in accordance with the terms and specifications of the primary contract and hence the S&M/Foley subcontract. By the terms of the subcontract agreement, the obligations of the Government are assumed towards S&M by Foley.

Foley has withheld payment from S&M in the amount of $297,215.75 which is owing by Foley to S&M under its subcontract, and has refused to compensate S&M for its expenses incurred as a direct result of these

delays, and certain requirements for equipment rentals and for extra work. As a result, S&M has made a demand for arbitration pursuant to Attachment 5, Schedule D of the subcontract seeking monetary relief in the amount of $1,112,648.63. Of the monetary relief sought, $297,215.75 represents amounts wrongly withheld by Foley under the subcontract and $815,432.88 represents compensation sought for delays relating to security clearance, additional work and changed conditions.

Under the terms and specifications of the prime contract, certain areas of the Project were "restricted" and required security clearance for all personnel working in such areas. Specifically, the prime contract under Part IV, Section L – Instructions, Conditions and Notice to Bidders stated under L.28

Security Conditions Affecting Work:

> Some of the work required by this solicitation may require access to restricted areas. Occasional delay in obtaining authorization for access to these areas or escort to a work site may be anticipated.

No time period is set forth in the Fort Ritchie contract as required for obtaining security clearance. Before S&M's final schedule Foley/Government personnel represented that sixty (60) days should be scheduled and anticipated by the Contractor as required to obtain security clearances.

S&M, in reasonable reliance on such representations, diligently and timely applied for security clearances for its personnel but was unable to obtain security clearances for the requisite number of skilled workers to commence

and prosecute the work as scheduled. When S&M was able to commence work, it was forced to do so without the requisite number of supervisors and crew to perform the work as originally scheduled and as reasonably anticipated. At variance with its intended schedule but in order to begin to accomplish its work, S&M was forced to change its work schedule from three eight-hour shifts to two ten-hour shifts. This modification of its anticipated procedure, necessitated by the unjustified security clearance delays, and in contradiction to express representations made by upper-tier representatives, further delayed S&M's work due to the loss of efficiency caused by extended work shifts and made S&M's work more costly because of the greater utilization of premium time to enhance production.

The security clearance delays were well in excess of the 60 days represented as required, or – for that matter – any other reasonable standard, and interfered with the proper execution of S&M's work by limiting the number of skilled personnel available to the project. S&M seeks an equitable adjustment of its contract price and time for these delays on the basis of constructive change, Government/Foley furnished property, and failure to provide access to the work. It is S&M's contention that these are compensable, not just excusable, delays.

S&M is also seeking an equitable adjustment in contract price and time for directed changes for additional work performed to seal water leaks after the required shotcrete had been successfully applied. In addition, S&M is seeking equitable adjustment in contract price and time for changed conditions in the Area D Upshaft which constituted a delay to S&M's work. As a result of

the changed condition, new plans had to be formulated, and as a result, additional delays were suffered by S&M.

In all, S&M is seeking an equitable adjustment to its contract in the amount of $1,112,648.63 and 184 calendar days. These delays are at the heart of the arbitration between S&M and Foley. S&M is seeking redress for the balance of its contract amount plus compensable extra work costs and extended delays, while Foley is seeking compensation for delays allegedly caused by S&M, lost performance and extended overhead relative to the delays, liquidated damages and for additional costs relative to the direct and indirect cost of repairs which Foley apparently claims were necessitated by S&M's failure properly to perform its work. In total, Foley is seeking $2,359,849.12 in its Counterclaim.

Certain components of Foley's claim are inconsistent. Assuming, arguendo, that S&M's delays are found not to be either compensable or excusable, Foley is not entitled to *both actual and liquidated* damages for delays caused by S&M. Rather, Foley would be limited to the contract provisions calling for liquidated damages. Moreover, certain of Foley's claims relating to overexcavation are necessary construction costs, and part of the inherent risk, assumed by Foley when it deleted from S&M's proposed scope of subcontract work, and decided to take upon itself, the obligation to perform the concrete work following excavation. Foley was warned by S&M representatives that the work deleted was more expensive than Foley anticipated because of the impossibility (understood by everyone familiar with underground construction – which Foley was not) of precisely controlling the manner in which rock breaks in blasting. It is Foley's

contention that S&M improperly excavated in certain areas, causing Foley additional expense. In fact, S&M employed industry standard techniques to control break as appropriate and practicable. Nevertheless, the rock breakage, an inevitable concomitant of the drill-and-blast method, is ultimately a function of geology.

While there are other numerous specific areas of dispute to be determined in this proceeding, S&M's basic position is that Foley cannot impose upon S&M the responsibility for delays that are actually compensable to S&M and which resulted from causes attributable solely to Foley and/or the Government as a result of Foley and/or the Government's failure properly to understand or schedule its own work.

Respectfully submitted,

ANDREWS & ASSOCIATES

JANUARY 16, 1992

/s/ Robert J. Andrews, Jr.
ROBERT J. ANDREWS, JR.
Regis. No. 0025043
4403 St. Clair Avenue
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(216) 881-8030

Attorney for Claimant

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

S&M CONSTRUCTORS, INC. Plaintiff, v. THE FOLEY COMPANY, Defendant.	)	CV92-1585 Case No. Division (Filed Jan. 23, 1992)

PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COMES NOW plaintiff S&M Constructors, Inc. ("S&M") and prays for judgment ordering a temporary restraining order of the arbitration proceedings between S&M and The Foley Company ("Foley"), Case No. 57 110 0079 90, before the American Arbitration Association, Kansas City, Missouri, scheduled to commence February 3, 1992, and that a preliminary injunction be issued thereafter, enjoining such arbitration. In support of its Petition S&M states:

1. S&M is an Ohio corporation in good standing with its offices at 29100 Hall Street, Solon, Ohio 44139.

2. Foley is a Missouri corporation in good standing with its offices at 7501 Front Street, Kansas City, Missouri 64120.

3. The dispute in arbitration arose under S&M's subcontract with Foley for excavation and other heavy underground construction services rendered at United States Army Corps of Engineers ("Corps of Engineers")

project known as the Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland ("Project") for which Foley was the general contractor.

4. S&M and Foley have filed claims with the Corps of Engineers for equitable adjustment for compensable delays resulting from the failure of the United States Government to grant security clearances for S&M's personnel in a timely manner, for changed conditions and for additional work, which claims aggregate in excess of $2,000,000. To date, the Contracting Officer for the Project has not made a final determination of these claims.

5. In the scheduled arbitration proceedings, S&M has made a demand against Foley for the same claims for equitable adjustment as set forth in paragraph 4.

6. Foley has filed a counterclaim in the arbitration proceedings seeking $2,359,849.12 for losses and extra expense caused by S&M's delays substandard performance of its subcontract with Foley. Foley contends that S&M's delays in turn have delayed and impacted Foley's scheduling and completion of the Project in a timely manner.

7. The delays for which Foley is basing its counterclaim are, for the most part, concurrent with the delays that are the basis of S&M's claim for equitable adjustment, and, similarly are based on commissions or omissions on the part of the United States Government.

8. The subcontract between S&M and Foley has caused a unique and conflicting situation based on the contradictory terms of the subcontract governing dispute

resolution. The S&M-Foley subcontract provides in Attachment 5, Schedule D, paragraph 1 as follows:

> 1. Incorporation Provision. All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis,* The Foley Co. and Subcontractor.
>
> Exhibit A annexed hereto.

Foley's contract with the Owner, the United States Army Corps of Engineers, contains a Disputes clause which requires that "all disputes arising under or relating to this contract shall be resolved under this clause." A copy of this Disputes clause is annexed hereto as Exhibit B. The Disputes clause requires that any claims must first be submitted to the United States Army Corps of Engineers Contracting Officer for a written decision, which decision shall be final unless the contractor appeals or files suit under the Contracts Disputes Act 41 U.S.C. Sections 601-613.

9. In addition to the Disputes clause which is incorporated by reference into the subcontract between S&M and Foley, the subcontract provides in Attachment 5, Schedule D, paragraph 2, as follows:

> 2. Arbitration and Enforcement Costs – It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, MO. Any costs

> including, without limitation, legal fees incurred by either party in the successful enforecement of any rights hereunder, shall be borne by the party against which said rights are enforced.
>
> Exhibit A annexed hereto.

10. The foregoing arbitration clause is the basis for the arbitration proceedings scheduled to commence on February 3, 1992 in Kansas City, Missouri.

11. The conflict that arises by virtue of the contradictory provisions for dispute resolution contained in Attachment 5 of the subcontract is that a bifurcated proceeding has resulted. First, S&M has made its claims, as has Foley, through the Government contract mandated disputes resolution process, for equitable adjustment based on compensable delays, additional work and changed conditions for which claims a determination has not yet been made. Second, the arbitration proceeding involves claims identical with those claimed for in accordance with the Government contract mandated disputes resolution process. Third, the counterclaims asserted by Foley in the arbitration are similarly identical with those Foley has submitted in accordance with the Government contract mandated disputes resolution process and are integrally tied to a determination of the validity of S&M's claims relating to delays which may either be compensable or excusable delays and therefore a valid defense to Foley's counterclaims.

12. The result of commencing arbitration at this time could be conflicting results that would be inequitable to the parties by failing to provide a means by which to redress these conflicts. By way of example, S&M could

prevail in the arbitration, winning its award and defeating Foley's counterclaim, yet Foley could lose its claim before the Corps of Engineers or Board of Contract Appeals which may find Foley is not entitled to additional compensation and that its delays (which would include S&M's) were neither compensable nor excusable. In this instance, Foley would have no means of redress because of the inherent limitation on the appeal of arbitration awards. Similarly, S&M might prevail before the Corps of Engineers or the Board of Contract Appeals with a finding that its delays were compensable, yet lose in arbitration and would have no means to reconcile its position. Such a potential conflicting result indicates that the issues are not yet ripe for arbitration.

13. In addition to the issue of potentially irreconcilable results, S&M maintains that the current arbitration proceeding must be enjoined based on the preemption of federal procurement.

14. The Project as well as Foley's contract with the Corps of Engineers is governed by federal government procurement law which dictates the means and methods of dispute resolution. By virtue of the incorporation of Foley's contract into S&M's subcontract, the dispute resolution mechanism dictated by Government regulations are controlling and preempt the consensual provisions of the subcontract relating to arbitration. Such a determination is clearly required where, as in the instant case, the parties have submitted their disputes for resolution by the Corps of Engineers Contracting Officer pursuant to the Disputes clause of the prime contract.

15. S&M maintains that should arbitration proceed, such proceedings would be in violation of federal law governing dispute resolution for government contracts and that S&M, and indeed Foley, may sustain irreparable harm resulting from conflicting decisions by the Corps of Engineers and the arbitration for which result S&M has no adequate remedy at law.

WHEREFORE, plaintiff S&M respectfully prays that:

A. This Court, by its order, temporarily restrain the defendant from proceeding to arbitration before the American Arbitration Association in Case No. 57 110 0079 90.

B. This Court, by its order, preliminarily enjoin the defendant from proceeding to arbitration before the American Arbitration Association in Case No. 57 110 0079 90.

C. This Court grant such further relief as it deems just and proper.

Respectfully submitted,

KRAFT, BROWER, GORDON AND ZELDIN

By: /s/ Ronald L. Kraft
Ronald L. Kraft – MO #21382

By: /s/ Robert B. Zeldin
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

S&M CONSTRUCTORS, INC. 29100 Hall Street Solon, Ohio 44139 Plaintiff -vs- THE FOLEY COMPANY 7501 Front Street Kansas City, Missouri 64120 Defendant	CASE NO. JUDGE (Filed Feb. 14, 1992) 92-0142-CV-W

MOTION FOR TEMPORARY RESTRAINING ORDER

Now comes Plaintiff S&M Constructors, Inc. ("S&M") pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and moves this Court for a temporary restraining order to prevent Defendant The Foley Company ("Foley") from proceeding to arbitration with S&M in Case No. 57 110 0079 90 before the American Arbitration Association, Kansas City, Missouri, which was originally scheduled to commence February 3, 1992. In support of its Motion, S&M states:

1. S&M is an Ohio corporation in good standing, with its offices at 29100 Hall Street, Solon, Ohio 44139.

2. Foley is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri.

3. Jurisdiction is predicated upon both diversity of citizenship within the terms of 28 U.S.C. §1332 and Federal subject matter jurisdiction under the Federal

Arbitration Act, 9 U.S.C. §1 *et seq.* and the Contracts Dispute Act of 1978, 41 U.S.C. §601 *et seq.*

4. The dispute between the parties arose out of S&M's subcontract with Foley for excavation and other heavy underground construction services rendered at United States Army Corps of Engineers ("Corps of Engineers") project designated as the Power Reliability Enhancement Program (AJCC) ("Project"), Fort Ritchie, Maryland.

5. Foley is the general contractor for the Project under the prime contract with the Corps of Engineers and contracted with the United States Government for all construction aspects of the Project.

6. The S&M-Foley subcontract provides in Attachment 5, Schedule D, paragraph 1:

> 1. Incorporation Provision. All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and subcontractor.
>
> [Exhibit A annexed hereto.]

7. Foley's prime contract with the Owner, the United States Army Corps of Engineers, contains a Disputes clause which states that "this contract is subject to the Contracts Disputes Act of 1978, (414 S.C. 601-613)" and which requires that "all disputes arising under or relating to this contract shall be resolved under this clause." A copy of this Disputes clause is annexed hereto as Exhibit B. The Disputes clause requires that any claims

must first be submitted to the Corps of Engineers Contracting Officer for a written decision, which decision shall be final unless the contractor appeals to the Board of Contract Appeals or files suit in the Claims Court under the Contracts Dispute Act of 1978, 41 U.S.C. §601 *et seq.*

8. Whereas the Disputes clause of the prime contract is incorporated by reference into the S&M-Foley subcontract, the subcontract also provides in Attachment 5, Schedule D, paragraph 2:

> 2. Arbitration and Enforcement Cost. It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, Missouri. Any costs including without limitation, legal fees incurred by either party in the successful enforcement of any rights hereunder, shall be borne by the party against which said rights are enforced.
>
> [Annexed hereto as Exhibit A.]

This arbitration clause is the basis for the pending arbitration proceeding.

9. In accordance with the Disputes clause of the prime contract between Foley and the Corps of Engineers, S&M, through Foley, has filed claims with the Corps of Engineers for equitable adjustment for compensable delays resulting from the failure of the United States Government to grant security clearances for S&M's personnel in a timely manner and for other reasons; Foley has additional claims against the government which

aggregate in excess of $2,000,000.00. S&M's claims are and Foley's claims are soon to be before the Contracting Officer for the Project and have not yet been decided.

10. S&M's demand against Foley in the arbitration proceeding is for the same claims for equitable adjustment as in S&M and Foley's claims against the Government. Foley has filed a counterclaim in the arbitration seeking $2,359,849.22 for losses and extra expense caused by S&M's delays and for its substandard performance under the S&M-Foley subcontract.

11. Foley's counterclaim is based on the premise that S&M's delays have delayed and obstructed Foley's scheduling and have, therefore, prevented Foley's completion of the Project in a timely manner.

12. The delays upon which Foley is basing its counterclaim are, for the most part, concurrent with the delays that are the basis of the S&M and Foley claim for equitable adjustment submitted to the Contracting Officer, and, thus, are based on commissions or omissions of the United States Government. The United States Government, which would not be party to an arbitration between Foley and S&M, is thus a necessary party whose presence is required properly to resolve nearly all of the disputes between the parties. Foley itself recognized this fact when on December 6, 1990 it filed its own Application to Stay Arbitration in the Circuit Court of Jackson County, Missouri at Kansas City.

13. The dispute between S&M and Foley raises a question of the conflict between Federal law governing the government procurement process and dispute resolution thereunder and the subcontract arbitration clause. It

is S&M's position that i) the Disputes clause and dispute resolution remedies under the United States Government procurement law and the Contracts Disputes Act of 1978 preempt consensual remedies such as arbitration, ii) there has been an election to proceed under the Disputes clause and the parties have not exhausted their administrative remedies thereunder and, iii) Federal law governing government contracts is controlling to stay arbitration in this instance.

14. The failure to issue a temporary restraining order will cause irreparable harm to S&M since it will then be committed to concurrent bifurcated proceedings a) under the Disputes resolution process before the Corps of Engineers and b) pursuant to arbitration. Such a decision creates duplicative effort and results which may be inconsistent with judicial or legal economy and result in inconsistent and irreconcilable decisions.

15. Both S&M and Foley have claims within the Disputes resolution process mandated by Foley's prime contract with the Corps of Engineers and both seek equitable adjustment based on compensable damages, additional work and changed conditions.

16. With respect to S&M, the arbitration proceeding involves claims identical to those subject to resolution under the Disputes resolution process mandated by the prime Government contract.

17. Foley's counterclaims in arbitration are generally identical with the claims Foley has submitted under the prime contract's Disputes clause and are integrally tied to a determination of the validity of S&M's claims relative to delays which may either be compensable or

excusable delays, and therefore, a valid defense to Foley's counterclaim.

18. The consequence of commencing arbitration at this time could be conflicting results that would be inequitable to the parties by failing to provide a means to redress these conflicts.

19. Such conflicting results would do irreparable harm to S&M in the event S&M prevailed in one forum but lost in another since there is no means to reconcile these positions and awards in arbitration are effectively unappealable.

20. The construction of subcontracts let under a prime contract with the Government is governed by Federal law. *American Pipe & Steel Corp. v. Firestone Tire & Rubber*, 292 F.2d 640 (9th Cir. 1961).

21. When, as in the instant case, there is a conflict of policy between the dispute resolution process mandated by the prime government contract and alternative means of dispute resolution, Federal law has favored the Federal Dispute resolution process or mechanism. *See, Grinnell Fire Protection Systems Co., Inc. v. Regents of the University of California*, 554 F.Supp. 495 (N.D. Cal. 1982); *cf Bache Halsey Stuart, Inc. v. French*, 425 F.Supp. 1231 (D.D.C. 1977).

22. By incorporating the Disputes Clause of the prime contract into the subcontract and by exercising their rights thereunder, Foley and S&M have elected that the Disputes clause and the Contract Disputes Act of 1978 is their rightful and primary avenue of redress. Once there has been a final decision rendered pursuant to the

Government contract dispute resolution process, any remaining matters which do not involve the government may be resolved in accordance with the arbitration clause of the subcontract. Clearly, the dispute between S&M and Foley is not, at this juncture, ripe for arbitration.

23. Upon the granting of S&M's request for a temporary restraining order, S&M shall file an application to this Court for a Preliminary Injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

WHEREFORE, plaintiff S&M Constructors, Inc. prays that this Court grant its request for a temporary Restraining Order staying defendant The Foley Company from proceeding to arbitration.

Respectfully submitted,

KRAFT, BROWER, GORDON AND ZEDLIN

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STATE OF OHIO)
) SS.:
COUNTY OF CUYAHOGA)

VERIFICATION

I, Ronan S. Marra, declare as follows:

I am Vice President of S&M Constructors, Inc. Plaintiff in the above captioned action and make this declaration on behalf of Plaintiff in my capacity as Vice President of Plaintiff.

I have read the foregoing Motion for Temporary Restraining Order and know its contents. I am informed and believe that the matters stated in the Motion are true, and on that ground allege that the matters stated in it are true.

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of February, 1992 at Cleveland, Ohio.

/s/ Ronan S. Marra
RONAN S. MARRA

SUBSCRIBED AND SWORN to before me, a Notary Public this 12th day of February, 1992.

/s/ Charles H. Manning
Notary Public

CHARLES H. MANNING, ATTORNEY
NOTARY PUBLIC, State of Ohio
My Commission Has No Expiration Date

IN THE COURT OF APPEALS
EIGHTH CIRCUIT
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

S&M CONSTRUCTORS, INC.	:	Case No.
Plaintiff-Appellant	:	92-0142-CV-W-6
	:	
-vs-	:	JUDGE
	:	
FOLEY COMPANY	:	
Defendant-Appellee	:	MOTION FOR TEMPORARY STAY OF ARBITRATION WHILE MOTION TO ENJOIN A DISTRICT COURT ORDER IS PENDING

Now comes the Plaintiff-Appellant, S&M Constructors, Inc., by and through counsel, and respectfully requests that this Honorable Court issue a one week injunction of an order denying Plaintiff-Appellant's Motion to Stay Arbitration and issue an Order to Stay Said Arbitration Pending Appeal.

This motion is being made pursuant to Rule 8 of the Federal Rules of Appellate Procedure. Counsel has previously moved for a stay in District Court. Counsel has also moved for an injunction by this Court of the District Court Order Pending Appeal which is attached hereto. The District Court denied counsel's application, and with an arbitration set for February 25, 1992, it is necessary to obtain an order staying arbitration while the motion and the appeal are pending. The reasons supporting the

granting of this motion are set forth in the following brief.

Respectfully submitted,

KRAFT, BROWER, GORDON AND ZEDLIN

/s/ Ronald L. Kraft
RONALD L. KRAFT
(MO Regis. 21382)
Attorney for Plaintiff-Appellant

IN THE COURT OF APPEALS
EIGHTH CIRCUIT
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

S&M CONSTRUCTORS, INC.	:	Case No. 92-0142-CV-W-6
Plaintiff-Appellant	:	
-vs-	:	JUDGE
FOLEY COMPANY	:	
Defendant-Appellee	:	MOTION TO STAY AN ORDER OF THE DISTRICT COURT PENDING APPEAL AND FOR AN IMMEDIATE AND TEMPORARY INJUNCTION STAYING PROCEEDINGS PENDING APPEAL

Now comes the Appellant, S&M Constructors, Inc., by and through counsel, and respectfully requests that this Honorable Court stay the order denying its Motion to Stay Arbitration while the order is challenged on appeal and grant an Immediate Temporary Injunction Staying Arbitration Pending Appeal.

This motion is being made pursuant to Rule 8 of the Federal Rules of Appellate Procedure. Counsel previously moved for a stay in the Federal District Court. The District denied counsel's application and it is therefore necessary to stay the scheduled arbitration while this appeal

is pending. The reasons supporting the granting of this motion are set forth in the following brief.

Respectfully submitted,
KRAFT, BROWER, GORDON AND ZEDLIN

/s/ Ronald L. Kraft
RONALD L. KRAFT
(MO Regis. 21382)
Attorney for Plaintiff-Appellant